Supreme Court, U. S. FILED

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In the

MICHAEL RODAK, JR., CLERK

## Supreme Court of the United States

October Term, 1976

No.

76-873

ARTHUR ANDERSEN & CO., Petitioner.

υ.

STATE OF OHIO, THE HONORABLE SHERMAN G. FINESILVER, UNITED STATES DISTRICT JUDGE, ET AL.,

Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATE OF OHIO, THE HONORABLE SHERMAN G. FINESILVER, UNITED STATES DISTRICT JUDGE, ET AL.,

Respondents.\*

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Arthur Andersen & Co. ("Andersen") petitions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review a judgment of that court entered December 1, 1976 in four consolidated appellate proceedings (three appeals and a petition for a writ of mandamus and prohibition pursuant to 28 U.S.C. §1651).

## OPINION BELOW

The Court of Appeals' opinion dismissing the appeals and declining to issue the requested writ of mandamus and prohibition (Appendix B, pp. 21-29) is not yet officially reported.

<sup>\*</sup>Respondents include all defendants in the underlying civil action, State of Ohio v. Crofters, Inc., et al., Civil Action No. C-4628 (D. Colo.), the caption of the complaint of which is Appendix A, pp. 18-20.

## JURISDICTION

The judgment and opinion of the Court of Appeals sought to be reviewed were entered on December 1, 1976 in State of Ohio v. Arthur Andersen & Co. (Nos. 76-1632, 76-1633 and 76-1710 (appeals)) and Arthur Andersen & Co. v. Honorable Sherman G. Finesilver, et al. (No. 76-1618 (petition for mandamus and prohibition)). The jurisdiction of this Court to review the instant case is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Whether it is error, or an abuse of power, for a United States District Court to enter a discovery order, with the attendant threat of sanctions under Rule 37, F. R. Civ. P., for noncompliance, directing a defendant to make discovery of documents and information in the possession of defendant's personnel in an office of defendant located in a friendly foreign country when (a) the laws of that country prohibit the making of such discovery and provide for the imposition of serious criminal penalties and civil sanctions upon those who violate such prohibitions, and (b) the defendant directed to comply with the discovery order is a firm based in the United States operating in the foreign country through offices located therein, the documents and information at issue were generated or obtained in a confidential relationship by personnel of defendant located in an office of defendant in the foreign country in the ordinary course of providing services to foreign nonparty businesses, and the defendant and its personnel located in the foreign country are subject to the prohibitions, penalties, and sanctions of the criminal and civil laws of that country.

## STATUTES INVOLVED

The statutes involved, which are set forth in Appendix C, pp. 30-39, are:

Statutes of the United States:

28 U.S.C. §1291 (U.S. Code, Vol. 7, p. 7562)

28 U.S.C. §1651 (U.S. Code, Vol. 7, p. 7601)

Penal Code of Switzerland:

Article 35 (Recueil Systematique du Droit Federal, Book 1, p. 9)

Article 36 (R.S.D.F., Book 1, p. 9)

Article 48 (R.S.D.F., Book 1, pp. 19-20)

Article 162 (R.S.D.F., Book 2, p. 57)

Article 273 (R.S.D.F., Book 2, pp. 89-90)

Rules:

Rule 34, Federal Rules of Civil Procedure (U.S. Code, Vol. 7, p. 7793)

Rule 37, Federal Rules of Civil Procedure (U.S. Code, Vol. 7, pp. 7798-99)

## STATEMENT

This case presents for review the entry of a judgment and opinion by the Court of Appeals for the Tenth Circuit dismissing appeals, and denying a petition for a writ of mandamus and prohibition, filed by Andersen and requesting the reversal of a series of pre-trial orders entered by the district court which directed Andersen to make discovery of documents and information in the possession of Andersen's personnel in its office located in Geneva, Switzerland, in violation of the criminal and civil laws of that friendly, foreign, sovereign state.

Andersen is a partnership of independent public accountants headquartered in Chicago, Illinois that has offices and conducts its practice throughout the United States and in numerous foreign countries. It is thus subject not only to the laws of the United States, but also to

the laws of the foreign countries in which it conducts its public accounting practice.

The question presented arises from a conflict between Andersen's duty to comply with the criminal and civil laws of Switzerland (one of the countries where it conducts its professional practice), and discovery orders of a United States District Court which ordered Andersen to make discovery of documents and information in the possession of its personnel in its Geneva, Switzerland office in violation of those laws.

This case was instituted on April 17, 1972 when Respondent State of Ohio ("plaintiff") filed a complaint in the United States District Court for the Southern District of Ohio, alleging violations of federal and state securities laws and common law fraud by Andersen and others, including King Resources Company ("KRC"). On November 17, 1972, the Judicial Panel on Multi-District Litigation transferred the case to the District of Colorado for coordinated pretrial proceedings with other cases arising out of the affairs of KRC. In re King Resources Company Securities Litigation, 352 F.Supp. 975 (J.P.M.L. 1972).

On May 27, 1976, at a late stage in the discovery proceedings, the district court (Honorable Sherman G. Finesilver, Judge) entered the first of the three discovery orders subsequently challenged by Andersen on appeal and by petition for writ of mandamus and prohibition. In this order the court granted plaintiff's motion, filed pursuant to Rule 37(a), F.R. Civ. P., to compel Andersen to produce documents and furnish information in the possession of Andersen's personnel in its office located in Geneva, Switzerland—which documents and information had been obtained or generated and maintained by Andersen's personnel in that office prior to the filing of this action in the normal course of examining and reporting on the financial

statements of foreign businesses. The court's May 27, 1976 order reads:

"3) Motion for discovery of certain documents of Andersen & Co. in Geneva Office is granted . . ." (District Court Docket, p. 12, May 27, 1976; Appendix D, p. 40).

Andersen had opposed plaintiff's motion, in pertinent part, on the grounds that the order sought would require Andersen and its personnel living and working in Switzerland to violate the criminal and civil laws of Switzerland, and herefore as a matter of law the district court could not properly enter such an order. Andersen had previously submitted to the district court a detailed opinion of Swiss counsel (Appendix E, pp. 41-76) which explained the applicable laws of Switzerland and concluded unequivocally that an order compelling the discovery of documents and information located in Switzerland would expose Andersen's personnel to the imposition of serious criminal penalties (including imprisonment) and would expose Andersen and its personnel to civil sanctions under Swiss law. Plaintiff had neither contradicted nor challenged the opinion of Swiss counsel retained by Andersen. Thus, when the district court entered its May 27, 1976 discovery order it was perfectly clear that the order would require Andersen and-its personnel to violate the laws of Switzerland; but, from all that appears in the record the district court did not address the problem. Furthermore, the court simply directed Andersen to produce; the order was not conditioned on Andersen being able to comply without violating the Swiss laws in question.

In brief summary, the Swiss criminal and civil laws involved provide that non-public documents and information obtained by accountants in the course of performing accounting and auditing work in Switzerland constitute the "business secrets" of the accountants' clients and of others to whom such information relates. Such information may

not be disclosed by the accountants to others, without the authorization of all persons who are considered as having a "legitimate interest" in the protection of the confidentiality of such information, including any state interests of Switzerland. Persons who have such a "legitimate interest" include the clients of the accountants and third persons whose affairs are reflected in the documents or information, as well as Switzerland itself if state interests may be involved. The Swiss law provides that the unauthorized disclosure of protected information can result in the imposition of serious criminal penalties upon Andersen personnel involved in or responsible for making such disclosures, even if made under the compulsion of an order of a United States court; the government license held by Andersen's Swiss office to perform bank, mutual fund and certain other types of auditing in Switzerland would be subject to revocation; and Andersen and its personnel would be exposed to civil liability to persons arguably damaged by the disclosures. (Appendix E. pp. 41-76).

Following entry of the May 27, 1976 order Andersen initiated efforts - which continue to date - to obtain the numerous authorizations which would be essential to enable it to comply with the district court's order without violating Swiss criminal law. Thus far Andersen has been unsuccessful in obtaining all of the necessary authorizations to produce numerous documents covered by the court's orders, and it appears that certain authorizations required will not be forthcoming. Andersen also filed a motion requesting the district court to reconsider its order and establish a schedule and procedures pursuant to which Andersen would take all reasonable steps to comply with the court's discovery order, short of those which would violate Swiss law. By order dated June 25, 1976, the district court denied Andersen's motion, stating, inter alia, "This Court is not of a view to establish or supervise a detailed blueprint for the discovery procedures in this regard." (Appendix F, pp. 77-78).

Having failed in its efforts to reach an accord with the district court, its time to appeal from the May 27 order running out, and no other avenues being available for reconciling the untenable position in which it had been placed, Andersen, on June 28, 1976, filed a notice of appeal from that order under the collateral order doctrine enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). The first of the four appellate proceedings (ultimately consolidated) leading to the judgment and opinion by the Court of Appeals here sought to be reviewed was thus initiated.

Despite the pendency of Andersen's appeal from the May 27, 1976 order the district court continued to exercise jurisdiction over this Swiss discovery matter, most significantly by entering the two additional orders directing discovery of such Swiss documents and information of which Andersen subsequently sought appellate review. Those orders (see Appendices G and H, pp. 79-84 and 85) entered on July 2, 1976 and on July 23, 1976, differed from the May 27, 1976 order only in that (1) they established "deadlines" for compliance - July 12, 1976 and August 19, 1976, respectively — and (2) they provided that Andersen was to produce certain of the documents for the court's in camera inspection. But, as established by a supplementary uncontested opinion of Swiss counsel submitted to the district court on July 9, 1976 (Appendix I, p. 86) an unauthorized disclosure of material deemed secret under Swiss law constitutes a violation of Swiss criminal and civil law even if the disclosure is limited to examination by a court. Accordingly, the district court's July 2, 1976 and July 23, 1976 orders suffered from the identical infirmity which affected the May 27, 1976 order: they required Andersen and its personnel to act in violation of the criminal and civil laws of Switzerland.

Contemporaneous with its entry of those supplementary discovery orders, the district court, although apprised by Andersen of the progress it was making in its efforts to comply with the discovery orders and with Swiss criminal law, and of the problems which remained (and again despite the pendency of Andersen's appeals), invited and conducted a hearing upon plaintiff's motion to impose sanctions upon Andersen for its failure to comply fully with the requested discovery. (Appendix J, p. 87). Plaintiff there requested the court to enter a number of findings of factwhich facts would substantially establish the most important allegations against Andersen made in plaintiff's complaintand to bar Andersen from introducing evidence in contradiction of those facts. On July 22, 1976, the first day upon which hearings were conducted by the district court on this matter, the court reflected its receptivity to the motion, commenting, inter alia, upon "the vast, strong power that the Court has even to dismiss a case." (Appendix K, p. 88). On the following day, during continued hearings on plaintiff's motion to impose sanctions, the district court was informed that the Court of Appeals had granted Andersen's motion for a stay pending dispositon of its appeals and petition for writ of mandamus and prohibition; plaintiff's motion for sanctions is, thus, still extant.

In addition to Andersen's appeal from the district court's May 27, 1976 order Andersen prosecuted two other appeals: on July 9, 1976 it filed a notice of appeal from the district court's July 2, 1976 order; on July 13, 1976 it filed a Petition for a Writ of Mandamus and Prohibition ("Andersen's Petition"); and on August 4, 1976 it filed a notice of appeal from the order of July 23, 1976. After consolidating the appeals and petition for writ of mandamus and prohibition (and, in effect, granting Andersen's motion to amend its Petition to include therein requests for relief as to all three discovery orders entered by the district court), the Court of Appeals heard argument and on December 1, 1976, issued the judgment and opinion here sought to be reviewed. (Appendix B, pp. 21-29).

In its opinion, the Court of Appeals, while acknowledging the exception to the finality requirement of 28 U.S.C. §1291 constituted by the "collateral order doctrine," held that that principle did not apply in this case and, therefore, dismissed Andersen's three direct appeals on the grounds that the orders appealed from were not appealable. In dealing with Andersen's Petition, the Court of Appeals confronted the merits of the question raised by Andersen which was central to all appeals, but held that Andersen was wrong and that the district court's entry of orders directing a violation of foreign law did not constitute an abuse, or usurpation, of power. The Tenth Circuit rejected a directly contrary line of decisions of the Second Circuit-Trade Development Bank v. Continental Insurance Co., 469 F.2d 35 (2d Cir. 1972); United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968); Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); First National City Bank v. Internal Revenue Service, 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960)—and held instead that "Foreign law may not control local law. It cannot invalidate an order which local law authorizes" (Appendix B, p. 27), and that the fact that compliance with a discovery order could lead to the imposition of criminal penalties under foreign law is entirely irrelevant to the validity of the order. (Ibid.).

## REASONS FOR GRANTING THE WRIT

1. This case squarely presents the question whether it is lawful for a United States District Court to enter an order (with the attendant threat of sanctions if not fully complied with) directing a defendant to make discovery of documents and information in the possession of defendant's personnel in its office located in a friendly, sovereign foreign state which documents and information were generated or obtained in a confidential relationship

by personnel of the defendant in defendant's office located in that foreign country in the ordinary course of providing services to foreign non-party businesses, when compliance with that order would require the violation of the foreign state's *criminal* and civil laws and would subject the defendant and its personnel to *severe criminal* penalties and civil sanctions.

It is Andersen's position that it is error, and an abuse or usurpation of power, for a court to enter such an order. Any rule to the contrary would offend principles of international comity — recognized by the United States — which require sovereign states to respect the integrity of the domestic laws and public policies of foreign sovereign states and, in addition, would be incompatible with and injurious to the political and economic interests of the United States which are furthered by international trade and commerce.

Even more fundamentally, any rule to the contrary would simply be unfair: a plaintiff benefited by such an order (and by any sanctions ultimately imposed by a court for a failure to comply fully with it) would be granted a "windfall" resulting from bringing suit against a defendant subject to the prohibitions, penalties and sanctions of a foreign country's laws; a defendant subject to the court's sanctions would be punished for matters entirely beyond its control.

Nor are there any "equities" presented by this case which favor the adoption of a rule to the contrary. A rule that Andersen cannot be ordered to do (and then sanctioned for failing to do) what it is prohibited by foreign law from doing, does not deprive the plaintiff of exercising its right — as it in fact already has done — of securing the offices of the court to compel Andersen to do whatever is lawfully permissible. Nor does a recognition of Andersen's

obligations under foreign law hamper plaintiff's right to secure possibly relevant evidence any more than does recognition of other exceptions to discovery, e.g., the attorney-client privilege; indeed, less so, since plaintiff remains free to make its own efforts to remove this particular impediment to discovery. Moreover, Andersen has not invoked the aid of the court to enforce any claim; Andersen is a defendant in this case. Andersen is not a plaintiff who might be deemed to have waived rights, or jeopardized otherwise legitimate claims, because of having instituted the litigation, i.e., "invok[ed] the aid of a court to vindicate rights asserted against another." Societe Internationale v. Rogers, 357 U.S. 197, 210 (1958).

Andersen has been brought to court by another party. That party has requested the production of documents which Andersen cannot produce without violating the criminal laws of Switzerland. Andersen, meanwhile, is inextricably caught between the Scylla of obedience with Swiss law/disobedience of the court's orders and the Charybdis of disobedience of Swiss law/compliance with the court's orders. Andersen's position simply is that an order which places a defendant in such a position is contrary to law.

We believe that until the entry of the discovery orders of the district court here, and the entry of the judgment affirming those orders by the Court of Appeals for the Tenth Circuit, all relevant judicial precedent in this country supported Andersen's position. See Trade Development Bank v. Continental Insurance Co., 469 F.2d 35 (2d Cir. 1972); United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968); Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); First National City Bank v. Internal Revenue Service, 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960). Indeed, in those cases the important

principles we advocate here have been espoused in unequivocal and uncompromising language—for example:

"Finally, the Bank argues that production of the branch's records located in Panama would require action by personnel in Panama in violation of the constitution and laws of Panama. If such were the fact we should agree that the production of the Panama records should not be ordered." (First National City Bank v. Internal Revenue Service, supra, 271 F.2d at 619; emphasis added);

and,

"Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures." (Ings v. Ferguson, supra, 282 F.2d at 152; emphasis added).

The settled law thus appears to be that the entry of an order directing discovery in violation of foreign law is improper.

In this case both lower courts have repudiated these principles. For example, during a hearing conducted in respect of plaintiff's motion for the imposition of sanctions upon Andersen for its failure to comply fully with the previously-ordered discovery of documents and information located in Switzerland, the district court explained its July 23, 1976 order directing such discovery as follows:

"Now, I want it clearly understood that the 19th of August is the cutoff date. The cutoff date is to-night for documents that you can get by tonight, but in any event, with or without consents, the Court wants full compliance by the 20th of August." (Appendix L, p. 89).

Under the applicable laws of Switzerland, which were fully

briefed by Andersen (with an extensive and uncontradicted opinion by Swiss counsel) before the district court, if Andersen were to produce any of the protected documents in question "without consents," i.e., authorizations from those persons (in this case, mainly foreign entities, and all entities independent and wholly beyond the control of Andersen) who have the right under Swiss law to insist upon the confidentiality of the documents, Andersen's personnel would be subject to serious criminal penalties and civil sanctions and Andersen would be subject to civil sanctions. Nevertheless, the district court, fully aware of those Swiss legal provisions, directed Andersen to act in violation of them.

The Court of Appeals for the Tenth Circuit has even more expressly repudiated the principles advanced by Andersen here and recognized consistently by courts in other cases:

"We are not impressed by Andersen's contention that international comity prevents a domestic court from ordering action which violates foreign law . . .

"An anomalous situation with great potential effect would result from recognition of the right of a litigant to avoid discovery permitted by local law through the assertion of violation of foreign law. Foreign law may not control local law. It cannot invalidate an order which local law authorizes." (Appendix B, p. 27).

This decision by the Court of Appeals is, we submit, not merely "in conflict with the decision of another court of appeals on the same matter" (Rule 19(1)(b) of the Supreme Court Rules; emphasis added), but in fact conflicts with the entire series of decisions by the Court of Appeals for the Second Circuit cited above.

This Court has once before concluded that a decision which bore upon the relationship between, and reconciliation of, the orders of domestic courts and the laws of foreign, friendly, sovereign states raised "important questions as to the proper application of the Federal Rules of Civil Procedure" which warranted review and consideration by this Court upon a petition for writ of certiorari. Societe Internationale v. Rogers, 357 U.S. 197, 203 (1958).

In Societe Internationale this Court implied that in the absence of the extraordinary facts there present (e.g., that the petitioner was a Swiss entity and thus "in a most advantageous position to plead with its own sovereign for relaxation of penal laws" [357 U.S. at 205], and that the documents which were not produced "might prove to be crucial in the outcome of this litigation" [id. at 201]\*), a holding that a United States court could not properly order a party to effect discovery in violation of foreign law would be appropriate:

"In view of these considerations, to hold broadly that petitioner's failure to produce the Sturzenegger records because of fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had 'control' over them, and thereby from ordering their production, would undermine congressional policies made explicit in the 1941 amendments [to the Trading with the Enemy Act], and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records...

"We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order." (357 U.S. at 205-206; emphasis added).

Here Rule 34 has not been flexibly "adapted to the exigencies of particular litigation." It has been applied in an inflexible manner, with no recognition that compliance with discovery orders issued under it would require a defendant to choose between being punished in the United States for failure to comply fully with those orders or being punished in Switzerland under the *criminal* law because it did fully comply with those orders.

Surely this is not the way the law should develop in the lower courts in light of this Court's opinion in Societe Internationale (and indeed, as noted above, not the way the law as expressed in the post-Societe Internationale decisions of the Court of Appeals for the Second Circuit cited at pages 11-12, supra, has developed). Thus, in the language of Rule 19(1)(b) of the Supreme Court Rules, the Court of Appeals for the Tenth Circuit has "decided a federal question in a way in conflict with [the one] applicable decision of this court..."

At a minimum, if Societe Internationale is read as being confined to cases involving the types of extraordinary facts there present, the dilemma in which Andersen has been placed by the lower court's orders here demonstrates that the Court of Appeals has "decided an important question of federal law which has not been, but should be, decided by this court." (Rule 19(1)(b)).

3. The question presented by the improper application of the Federal Rules of Civil Procedure in this case

<sup>\*</sup>By contrast, in this case during the July 23, 1976 hearing on plaintiff's motion to impose sanctions upon Andersen for its failure to comply fully with the Court's orders, the district court referred to the "peripheral" bearing to the case of the discovery ordered. (Appendix L, p. 89).

has such a potentially broad and pernicious effect as to require this Court's review and resolution. Andersen is but one of many American firms doing business abroad. Such firms are subject not only to the laws of the United States, but also to the laws of the other countries in which they do business, including Switzerland and other jurisdictions having one form or another of secrecy laws which can and do directly affect the ability of those firms to comply with orders of American courts that they make discovery of documents and information in such countries, which were generated or obtained in a confidential relationship.

If what has happened to Andersen here is not reviewed and corrected, the effect will be to place in jeopardy the foreign operations of American firms by the establishment of a rule of law that their own sovereign (the United States), acting through its judicial branch, can lawfully compel them to violate the criminal laws of foreign nations in which they do business.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 23, 1976

#### APPENDIX A

CAPTION OF THE COMPLAINT IN STATE OF OHIO V. CROFTERS, INC., ET AL., CIVIL ACTION NO. C-4628 (D. COLO.)

# IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

STATE OF OHIO, Plaintiff,

VS.

CROFTERS, INCORPORATED, a corporation

88 East Broad Street Columbus, Ohio 43215

and

DEE GEE COMPANY,

a partnership

88 East Broad Street

Columbus, Ohio 43215

and

SIDNEY D. GRIFFITH

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Amlin, Ohio 43002

and

HARRY A. GROBAN\*

296 South Merkle Road

Columbus, Ohio 43209

and

GERALD A. DONAHUE

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Columbus, Ohio 43209

Civil Action No. 72-138 and

KING RESOURCES COMPANY,

a corporation

Security Life Building

Denver, Colorado 80202

and

JOHN M. KING

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Engiewood, Colorado 80110

and

WILLIAM V. COFFEY\*

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Englewood, Colorado 80110

and

THE COLORADO CORPORATION,

a corporation

200 Brooks Tower Building

Denver, Colorado 80202

and

REGENCY INCOME CORPORATION

a corporation

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and

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Denver, Colorado 80218

and

ELLIOT KEENE WOLCOTT

Route 1, Box M-19

Del Mar, California 92014

Civil Action No. 72-138 and

## ARTHUR ANDERSEN & COMPANY

a partnership 69 West Washington Street Chicago, Illinois 60602

and

## DUN & BRADSTREET, INCORPORATED

c/o William J. Workman c/o C.T. Corporation System Union Commerce Building Cleveland, Ohio 44115

and

FINANCIAL DATA RELATIONS, INC.

a corporation 9896-A Wilshire Boulevard Beverly Hills, Calif. 90210

and

RONALD R. HOWARD 901 North Roxbury Beverly Hills, Calif. 90210, Defendants.

Civil Action No. 72-138

\*The defendants marked with an asterisk have been dismissed from the action.

## APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, DATED **DECEMBER 1, 1976.** 

> UNITED STATES COURT OF APPEALS TENTH CIRCUIT

ARTHUR ANDERSEN & CO.,

Petitioner,

V.

No. 76-1618

HONORABLE SHERMAN G. FINESILVER, etc., et al.,

Respondents.

PETITION FOR WRIT OF **MANDAMUS** (D.C. No. C-4628)

STATE OF OHIO,

Plaintiff-Appellee,

Nos. 76-1632

V.

ARTHUR ANDERSEN & CO.,

Defendant-Appellant.

76-1633 and 76-1710

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. C-4628)

Paul E. Goodspeed (Coghill Goodspeed & Roble, Wilson & McIlvaine; Of Counsel: H. Thomas Coghill, Charles W. Boand and George W. Thompson, on the brief) for Appellant-Petitioner.

Miles M. Gersh (Harry L. Hobson, Luke J. Danielson and Holland & Hart, on the brief) for Plaintiff-Appellee.

Before LEWIS, Chief Judge, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The consolidated cases, one a petition for writ of mandamus and three direct appeals, all relate to pre-trial discovery orders entered by the district court. Petitioner and appellant, Arthur Andersen & Co., objected to the production of certain documents on the ground that production would violate the non-disclosure laws of Switzerland. The district court overruled the objections. We dismiss the appeals and deny the writ of mandamus.

In the Spring of 1970, the State of Ohio loaned King Resources Company, KRC, \$8,000,000. In August, 1971, an involuntary petition under Chapter X of the Bankruptcy Act was filed against KRC. In the bankruptcy proceedings which are still pending, KRC has acknowledged its debt to Ohio.

On April 17, 1972, Ohio brought this suit in the United States District Court for the Southern District of Ohio against Andersen and others. Jurisdiction is based on § 22(a) of the Securities Act of 1933 as amended, 15 U.S.C. § 77v(a), and on § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. KRC is one of the defendent

dants. The Judicial Panel on Multidistrict Litigation transferred the case to the District of Colorado for coordinated proceedings with other cases arising out of the affairs of KRC. In re King Resources Company Securities Litigation, J.P.M.L., 352 F.Supp. 975. So far as the instant case concerns KRC, it has been stayed by an order in the bank-ruptcy proceedings.

Andersen is a partnership with its principal office in Chicago, Illinois. Andersen is an international organization of accountants with offices throughout the world. Ohio claims that in its purchase of KRC securities, it relied on financial statements which were prepared by Andersen and which related to the financial condition of KRC. Ohio says that audits of KRC by Andersen fraudulently misrepresented the financial condition of KRC in violation of federal and state securities laws.

During the final stages of the pre-trial discovery process, Ohio requested Andersen to produce various documents which Andersen had in its possession at its Geneva, Switzerland office. After much sparring, the number of documents involved was reduced to 20. Andersen refuses to produce the documents because production would allegedly violate Swiss secrecy laws.

On May 27, 1976 the district court granted Ohio's motion for discovery. Notice of appeal from this order was filed and is our number 76-1632. The May 27 order was modified on July 2 and a notice of appeal from that order was filed on July 9, our number 76-1633. On July 13, Andersen filed a petition for mandamus relief from the two mentioned orders. It is our number 76-1618. On July 23 we granted a temporary stay of the orders. On the same day the district court again modified the discovery order and required the production of the documents here in question. Notice of appeal was filed August 4. It is our number 76-1710. We permitted the filing of the mandamus

petition, required a response and consolidated that case with the three direct appeals. The stay was continued until the disposition of the four cases.

At the outset we are met with procedural problems. The orders covered by Nos. 76-1633 and 76-1710 were entered after notice of appeal had been filed to review the May 27 order. One query is the validity of the last two orders.

An unpublished opinion in No. 75-1297, Burnworth v. Salefish Incorporated, says that the filing of a notice of appeal deprives the district court of subject matter jurisdiction. See also 9 Moore's Federal Practice ¶203.11, pp. 735-740. In Euziere v. United States, 10 Cir., 266 F.2d 88, 91, vacated on other grounds, 364 U.S. 282, we said that the mentioned principle "presupposes that there is a valid appeal from an appealable order."

The Circuits disagree on whether the filing of a notice of appeal automatically divests a district court of jurisdiction. Some cases hold that there is no retained jurisdiction. See e.g. First National Bank of Salem, Ohio v. Hirsch, 6 Cir., 535 F.2d 343, 345 n. 1; United States v. Lafko, 3 Cir., 520 F.2d 622, 627; and Williams v. Bernhardt Bros. Tugboat Service, Inc., 7 Cir., 357 F.2d 883, 884-885. See also Hovey v. McDonald, 109 U.S. 150, 157.

Other courts have held that a district court has some retained jurisdiction after a notice of appeal has been filed. Hodgson v. Mahoney, 1 Cir., 460 F.2d 326, 328, cert. denied 409 U.S. 1039, says that when a notice of appeal is "manifestly deficient" by reason of a non-appealable order or otherwise, the district court may disregard it and proceed with the case "[o]therwise a litigant could temporarily deprive a court of jurisdiction at any and every critical juncture." In Ruby v. Secretary of United States Navy, 9 Cir., 365 F.2d 385, cert. denied 386 U.S. 1011, the Ninth Circuit considered the problem in an en banc session. It

held, Ibid. at 389, that if the notice of appeal is clearly invalid, the district court may ignore it. We are in essential agreement with the Ninth Circuit. If the notice of appeal is deficient by reason of untimeliness, lack of essential recitals, reference to a non-appealable order, or otherwise, the district court may ignore it and proceed with the case. If the district court is in doubt whether the notice of appeal is valid, it may decline to act further until disposition of the appeal. If the district court proceeds with the case under the mistaken belief that the notice of appeal is inoperative, the complaining party may seek relief from the court of appeals under 28 U.S.C. § 1651 and Rule 21, F.R.A.P.

In the instant case the trial court proceeded with the case. The objecting party petitioned the court of appeals for mandamus relief. The first question is the validity and effect of the notice of appeal attacking the May 27 order. Appellate jurisdiction is claimed under 28 U.S.C. § 1291 which gives the courts of appeals jurisdiction to review final decisions of district courts. We are concerned with an interlocutory order relating to discovery.

In Cohen v. Beneficial Loan Corp., 337 U.S. 541, the district court refused to apply a state statute which required plaintiff, in certain circumstances, to post security to indemnify defendant for expenses and attorneys' fees if plaintiff failed to make his complaint good. The Supreme Court said that the order was appealable under § 1291 "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." Ibid. at 546-547.

We have held that an order for the production of documents is not normally appealable under the Cohen "collateral order" doctrine. Paramount Film Distributing Corp. v. Civic Center Theatre, 10 Cir., 333 F.2d 358, 361-362. In Covey Oil Company v. Continental Oil Company, 10 Cir., 340 F.2d 993, 995-997, cert. denied 380 U.S. 994,

we recognized an exception to this general rule where the order is collateral, fairly separable from the main litigation, and relates to a non-party who shows irreparable injury. See Natta v. Hogan, 10 Cir., 392 F.2d 686, 689.

In Societe Internationale v. Rogers, 357 U.S. 197, the Court held that a district court could not impose the sanction of dismissal against a plaintiff because the plaintiff had failed to produce foreign records on the ground that production would subject it to criminal prosecution in a foreign country. The Court said, Ibid. at 208:

"Whatever its reason, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of non-compliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply."

Societe implies that consideration of foreign law problems in a discovery context is required in dealing with sanctions to be imposed for disobedience and not in deciding whether the discovery order should issue. The dilemma is the accommodation of the principles of the law of the forum with concepts of due process and international comity.

Certain Second Circuit cases arising after Societe suggest that a district court should not order production if the order would cause a party to violate foreign law. See First National City Bank of New York v. Internal Revenue Service, 2 Cir., 271 F.2d 616, 619; Ings v. Ferguson, 2 Cir., 282 F.2d 149, 152; and Application of Chase Manhattan Bank, 2 Cir., 297 F.2d 611, 613. Compare United States v. First National City Bank, 2 Cir., 396 F.2d 897, 900-901. The failure of these cases to recognize the distinction between power to compel discovery and imposition of sanctions for noncompliance has been criticized. See e.g. Note, Discovery of Documents Located Abroad in U.S. Antitrust

Litigation, 14 Va. J. Int. L., 747, 753. The importance of this distinction has been recognized. See Wright, Discovery, 35 F.R.D. 39, 81; and Restatement, 2d, Foreign Relations Law of the United States, § 39.(1), p. 111. See also Calcutta E. Coast of India & E. Pakistan/U.S.A. Conf. v. Federal Martitime [sic] Commission, D.C. Cir., 399 F.2d 994, 998-999, and American Industrial Contracting, Inc. v. Johns-Manville Corp., W.D.Pa., 326 F.Supp. 879, 880-881.

The procedural problems must be considered in the light of the mentioned background. Section 1291 requires a final decision. We have an important and extraordinary situation which, although not pertaining to the merits and not subjecting Andersen to actual harm, has the potential of causing harm if Andersen chooses not to comply. Societe does not say that a discovery order mandating violation of foreign law is invalid. It only indicates that the foreign law question goes to the imposition of a sanction for noncompliance with foreign law.

We are not impressed by Andersen's contention that international comity prevents a domestic court from ordering action which violates foreign law. See Restatement, 2d, Foreign Relations Law of the United States, § 39.(1). If the problem involves a breach of friendly relations between two nations, Andersen should call the matter to the attention of those officers and agencies of the United States charged with the conduct of foreign affairs, and they could make such representation to the court as they deemed suitable. Andersen has not taken this action. Instead, it purports to speak for the United States.

An anomalous situation with great potential effect would result from recognition of the right of a litigant to avoid discovery permitted by local law through the assertion of violation of foreign law. Foreign law may not control local law. It cannot invalidate an order which local law authorizes.

The Supreme Court has spoken out against piecemeal reviews. Kerr v. United States District Court, 48 L.Ed.2d 725; see also DiBella v. United States, 369 U.S. 121, 126. The district court had the power to enter the discovery orders. Andersen has the right of a direct appeal from any final judgment on the merits. The essence of Andersen's objections is that the discovery orders subject it to irreparable harm. As said in Ryan v. Commissioner of Internal Revenue, 7 Cir., 517 F.2d 13, 19:

"Every interlocutory order involves, to some degree, a potential loss or harm. That risk, however, must be balanced against the need for efficient federal judicial administration, the need for the appellate courts to be free from the harassment of fragmentary and piecemeal review of cases otherwise resulting from a succession of appeals from the various rulings which might arise during the course of litigation."

Although we recognized in Paramount Film Distributing Corp., 10 Cir., 333 F.2d 358, 362, that the Cohen "collateral order" doctrine may be applied in discovery proceedings "upon a proper showing", no proper showing has been made here. When and if a subsequent order of the court imposes a harmful sanction, that order may then be reviewed. The discovery orders are not final decisions and not appealable under § 1291.

The mandamus petition, No. 76-1618, raises the serious and important question of whether the entry of the discovery orders by the district court was an usurpation of power. Kerr v. United States District Court, 48 L.Ed.2d 725, says that mandamus is proper when a party has no other adequate means to obtain relief and his right to relief is clear and indisputable. Our denial of the appealability of the orders under § 1291 leaves Andersen's sole remedy that of application for an extraordinary writ under 28 U.S.C. § 1651. See also Rule 21, F.R.A.P. In the cir-

cumstances, mandamus is a proper method of raising the question of usurpation of power. We have considered the question and, for the reasons stated above, conclude that the district court did not usurp any power.

In Nos. 76-1632, 76-1633, and 76-1710, the appeals are dismissed for lack of a final, appealable order. In No. 76-1618, the petition for mandamus relief is denied.

## APPENDIX C

## STATUTES INVOLVED

## STATUTES OF THE UNITED STATES

## 28 U.S.C. § 1291 Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1975, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

## 28 U.S.C. § 1651 Writs

- (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
- (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. As amended May 24, 1949, c. 139, § 90, 63 Stat. 102.

## PENAL CODE OF SWITZERLAND

## Article 162

## French:

Celui qu aura révélé un secret de fabrication ou un secret commercial qu'il était tenu de garder en vertu d'une obligation légale ou contractuelle,

celui qui aura mis à profit cette révélation,

sera, sur plainte, puni de l'emprisonnement ou de l'amende.

## English:

Anyone who discloses manufacturing or business secrets which he was required to respect by virtue of a legal or contractual obligation, and anyone who profits from such disclosure, shall upon complaint be punishable by imprisonment or fine.

#### Article 273

## French:

Celui qui aura cherché à découvrir un secret de fabrication ou d'affaires pour le rendre accessible à un organisme officiel ou privé étranger ou à une entreprise privée étrangère, ou à leurs agents,

celui qui aura rendu accessible un secret de fabrication ou d'affaires à un organisme officiel ou privé étranger, ou à une entreprise privée étrangère, ou à leurs agents,

sera puni de l'emprisonnement ou, dans les cas graves, de la réclusion. Le juge pourra en outre prononcer l'amende.

## English:

Any person who attempts to discover a manufacturing or business secret in order to make it available to an official or private foreign organization, or to a private foreign enterprise, or to their agents,

Or any person who makes available a manufacturing of business secret to an official or private foreign organization, or to a private foreign enterprise or to their agents,

Shall be liable to imprisonment or, for serious offences, to solitary confinement. The court may in addition impose a fine.

## Article 35

## French:

La réclusion est la plus grave des peines privatives de liberté. Sa durée est d'un an au moins et de vingt ans au plus. Lorsque la loi le prévoit expressément, la réclusion est à vie.

## English:

Solitary confinement is the most serious of the penalties depriving a person of liberty. Duration is for not less than one year nor more than twenty years. If expressly provided for by law, solitary confinement is for life.

## Article 36

## French:

La durée de l'emprisonnement est de trois jours au moins et, sauf disposition expresse et contraire de la loi, de trois ans au plus.

## English:

The length of time of imprisonment is of not less than three days and in the absence of express contrary provision of the law, not more than three years.

## Article 48

## French:

1. Sauf disposition contraire de la loi, le maximum de l'amende sera de 40,000 francs.

Si le délinquant a agi par cupidité, le juge ne sera pas lié par ce maximum.

2. Le juge fixera le montant de l'amende d'après la situation du condamné, de façon que la perte à subir par ce dernier constitute une peine correspondant à sa culpabilité.

Pour apprécier la situation du condamné, le juge tiendra compte notamment des éléments ci-après: revenu et capital, état civil et charges de famille, profession et gain professionel, âge et état de santé.

3. L'amende est éteinte par la mort du condamné.

## English:

- 1. In the absence of a contrary provision of law, the maximum fine shall be Swiss francs 40,000. If the condemned has acted through cupidity, the judge shall not be bound by this maximum.
- 2. The judge shall fix the amount of the fine in accordance with the situation of the condemned man, in such a manner that the loss undergone by the latter shall constitute a penalty corresponding to his guilt.

In order to appreciate the condemned man's situation, the judge shall take into account in particular the following elements: income and capital, civil status and family charges, profession and professional income, age and state of health.

3. The fine is extinguished by the death of the condemned man.

## FEDERAL RULES OF CIVIL PROCEDURE

## **Rule 34:**

## PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data

compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

As amended Dec. 27, 1946, eff. March 19, 1948; March 30, 1970, eff. July 1, 1970.

## **Rule 37:**

## FAILURE TO MAKE DISCOVERY: SANCTIONS

- (a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
- (1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.
- (2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

- (3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.
- (4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

## (b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

- (2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
- (E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

- (c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.
- (d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees.

caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

- (e) Subpoena of Person in Foreign Country. A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.
- (f) Expenses Against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

  As amended Dec. 29, 1948, eff. Oct. 20, 1949; March 30, 1970, eff. July 1, 1970.

#### APPENDIX D

EXCERPTS FROM THE DOCKET SHEET OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO REFLECTING ORDER OF MAY 27, 1976.

STATE OF OHIO
vs
CROFTERS, INC., ET AL

C-4628-Pages 12, 13

## **PROCEEDINGS**

DATE 1976

5/26

## ORDERS RE DISCOVERY MOTIONS:

3) Motion for discovery of certain documents of Andersen & Co. in Geneva Office is granted; Court will not impose sanctions.

eod 5/27

## APPENDIX E

## OPINION OF SWISS COUNSEL

Lenz, Schluep, Briner & De Coulon Avocats au Barreau de Genève 25. Grand'Rue • 1211 Genève 11

## LEGAL OPINION

Having been requested by Arthur Andersen & Co. with respect to several questions relating to the laws of Switzerland regarding the disclosure by auditors and accountants of documents and other information in their possession in Switzerland.

The undersigned member of the above firm hereby certifies and declares as follows:

- That he is a duly licensed advocate (attorney) practising in Switzerland b fore the courts of the Canton of Geneva;
- That he is versed in the laws of Switzerland, including its treaties, statutes and the decisions of its courts;
- That the statutes herein set forth are true, complete and correct copies in the French language or English translations of the official statutes of Switzerland referred to herein and that said statutes have not been repealed, amended or otherwise modified;
- That this opinion accurately and correctly sets forth his opinion of Swiss law on the subject matter as presently in effect.

## I. FACTS

We understand that the reasons for which our opinion is requested is based upon the following facts:

The Swiss branch office of Arthur Andersen & Co., during a period commencing prior to 1968 and continuing through a portion of 1971, performed various auditing work on behalf of Fund of Funds Limited and its subsidiary ("F.O.F."), and on behalf

of Investors Overseas Service Ltd. and its subsidiaries and affiliated companies ("I.O.S."), which consisted in part of auditing Swiss companies as auditors appointed under the relevant provisions of the Swiss Code of Obligations, in part of auditing Swiss offices of foreign companies operating in Switzerland, and in part of auditing foreign companies for which records were kept in Switzerland. Auditing work regarding a Swiss bank was also done at the request of I.O.S. by an affiliate of Arthur Andersen & Co. organized under the laws of Switzerland, which was not the statutory auditor of that bank under the Swiss banking law.

Arthur Andersen & Co. is a defendant in a civil lawsuit pending in the United States district court for the district of Colorado entitled State of Ohio v. Crofters, Inc., et al. The lawsuit is an action by the State of Ohio under United States securities laws and State statutory and common law, in which the State of Ohio seeks money damages from Arthur Andersen & Co. and others in respect of certain loans made by the State to King Resources Company which were not repaid when due. During the course of pretrial proceedings in that action, the State of Ohio (the adversary of Arthur Andersen & Co.) has requested that Arthur Andersen & Co. voluntarily produce for inspection by the State of Ohio many types of documents relating to the auditing work performed by Arthur Andersen & Co. for F.O.F. and I.O.S. and obtained by Arthur Andersen & Co. in its confidential relationship with F.O.F. and I.O.S. as auditors, which documents may be located at the offices of Arthur Andersen & Co. in Switzerland-for example:

"Any and all documents used in examining the financial condition of I.O.S. or its subsidiaries or affiliates, or relating to such financial condition, specifically including but not limited to documents reflecting sales and redemptions of fund shares, quotations of value of fund shares, results or operations, cash flow forecasts, studies of source and application of funds, liquidity, available lines of credit, cash balances, or other documents reflecting the current liquidity of such companies during the period from January 1, 1968 to May 1, 1971."

The State of Ohio has also propounded to Arthur Andersen & Co. written questions and has requested that the answers to such questions include any information which may be available in the offices of Arthur Andersen & Co. in Switzerland.

Arthur Andersen & Co. has declined to produce voluntarily any documents located in Switzerland, and has similarly declined to answer any questions on the basis of information which may be available in Switzerland, on the ground that to do either might subject it and its Swiss affiliate or the partners and employees of either, to sanctions under applicable Swiss laws.

The State of Ohio is now seeking an order of the United States district court directing Arthur Andersen & Co. to produce documents which may be located in the offices of Arthur Andersen & Co. and its Swiss affiliate in Switzerland, and to answer written questions on the basis of any responsive information which may be available in the offices of Arthur Andersen & Co. and its Swiss affiliate in Switzerland.

## II. PROVISIONS APPLICABLE

The following various legal provisions upon which this opinion is based are, in the belief of the undersigned, true, complete and correct English translations of the exhibits attached hereto and listed as follows:

Exhibit A-Swiss Code of Obligations (Commercial Law) Article 730 Exhibit B-Swiss Penal Code, Article 162

Exhibit C-Swiss Penal Code, Article 273

Exhibit D-Swiss Penal Code, Article 321

Exhibit E-Swiss Penal Code, Article 3

Exhibit F-Swiss Penal Code, Article 4

Exhibit G-Swiss Penal Code, Article 5

Exhibit H-Swiss Penal Code, Article 7

Exhibit I-Swiss Federal Banking Law, Article 47

## Exhibit A-Swiss Code of Obligations, Article 730 Duty to maintain secrecy

"Auditors of a corporation are prohibited from communicating to individual shareholders or to third parties any information obtained in the carrying out of their duties."

## Exhibit B-Swiss Penal Code, Article 162 Breach of manufacturing or business secrets

"Anyone who discloses manufacturing or business secrets which he was required to respect by virtue of a legal or contractual obligation, and anyone who profits from such disclosure, shall upon complaint be punishable by imprisonment or fine."

## Exhibit C—Swiss Penal Code, Article 273 Disclosure of economic information

"Any person who attempts to discover a manufacturing or business secret in order to make it available to an official or private foreign organization, or to a private foreign enterprise, or to their agents,

Or any person who makes available a manufacturing or business secret to an official or

private foreign organization, or to a private foreign enterprise or to their agents,

Shall be liable to imprisonment or, for serious offences, to soli confinement. The court may in addition impose a fine."

## Exhibit D-Swiss Penal Code, Article 321 Breach of professional secrecy

"(Cipher 1) Priests, lawyers, advocates, notaries, auditors subject to professional secrecy by virtue of the Swiss Code of obligations, doctors, dentists, pharmacists, midwives, as well as their assistants, who disclose a secret entrusted to them by virtue of their profession or who have gained knowledge of such secret in the exercise of such profession, shall, upon complaint, be punishable by imprisonment or fine.

Students who disclose a secret which they have learned during the course of their studies shall also be subject to the same penalty.

Such disclosure shall be punishable even though the person to whom the secret is entrusted no longer exercises his profession or has finished his studies.

(Cipher 2) Disclosure shall not be punishable if it was made with the consent of the interested party or if, upon the application of the person having knowledge of the secret, the governing authority or the supervisory authority has so authorized him in writing.

(Cipher 3) The provisions of the Federal and Cantonal legislations concerning the duty to inform the authorities or to give

evidence in court proceedings shall remain applicable."

## Exhibit E-Swiss Penal Code, Article 3 Territorial application

"(Cipher 1) This code is applicable to any person who commits a felony or misdemeanor in Switzerland.

If the offender has served a sentence for his act, either fully or partially, in another country, the Swiss court shall credit him with the portion so served.

(Cipher 2) An alien who has been prosecuted in a foreign country at the request of the Swiss authorities shall not be punished for the same offence in Switzerland:

If the foreign court has acquitted him, or if the penalty to which he had been sentenced in the foreign country has been served, suspended or has come within the statute of limitations.

If the offender has not served or only partially served it, the whole sentence or the remainder shall be served in Switzerland."

# Exhibit F-Swiss Penal Code, Article 4 Felonies or misdemeanors committed abroad against the State

"This code is applicable to any person who, while abroad, commits a felony or misdemeanor against the State (Article 265, 266, 266bis, 267, 268, 270, 271, 275, 275bis, 275ter) or is guilty of espionage (Articles 272 to 274) or harms military security (Articles 276 and 277).

If as a result of such information [sic; should be infraction] such person has served a sentence, either totally or partially, abroad, the Swiss Court shall credit him with the sentence served."

## Exhibit G-Swiss Penal Code, Article 5 Felonies or misdemeanors committed abroad against Swiss national

"This code is applicable to any person who commits a felony or misdemeanor abroad against a Swiss national, provided the act is also punishable in the place where it is done, and further provided that the person who has done such act is in Switzerland and has not been extradited abroad, or has been extradited to the Confederation because of the infraction. The foreign law will, however, be applicable if it is more favorable to the accused.

The person who has done such act can no longer be punished therefore if he has served the sentence pronounced against him abroad, if he has been released from completing such sentence, or if punishment abroad is barred by the statute of limitations.

If he has not served the sentence pronounced against him abroad, the sentence shall be served in Switzerland; if he has served but a part of such sentence, the remainder shall be served in Switzerland."

# Exhibit H-Swiss Penal Code, Article 7 Place of commission of the felony or misdemeanor

"A felony or misdemeanor is deemed to have been committed at the place where the offender committed it and where the effect has occurred.

An attempt is deemed to have been committed at the place where the offender attempted it and where the effect was designed to occur."

Exhibit I-Swiss Federal Banking Law of 1934, Article 47

## Disclosure of banking secrets

"(Cipher 1) Anyone who, in his capacity as an officer, director, employee, authorized agent, liquidator or commissioner of a bank, or as a representative of the Banking Commission or as an officer, director or employee of a licensed auditing firm discloses a secret entrusted to him or which he has become aware of by reason of his duties,

or anyone who induces or attempts to induce a person to violate his professional duty of secrecy, shall be liable to imprisonment for up to six months or to a fine up to Sw.Fr. 50'000.—, or both.

(Cipher 2) If the offender acted with negligence, he shall be liable to a fine of up to Sw.Fr. 30'000.—.

(Cipher 3) The breach of a secret shall be punishable even though the contractual or employment relationship has been terminated or the person to whom the secret is entrusted no longer exercises his profession.

(Cipher 4) The provisions of the Federal and Cantonal legislations concerning the

duty to inform the authorities or to give evidence in court proceedings shall remain applicable."

## III. COMMENTS ON ABOVE QUOTED PROVISIONS

1. Breach of professional secrecy: Swiss Code of Obligations, Article 730 and Swiss Penal Code, Article 321

Swiss law only provides a client-auditor privilege for the relationship with the statutory auditors which a Swiss company is required to have as per the provisions of the commercial law (Swiss Code of Obligations: Articles 727 seq. in particular Article 730 quoted above (Exhibit A). The penal sanction for the prohibition contained in Article 730 of the Swiss Code of Obligations against statutory auditors communicating information obtained in the carrying out of their duties is found in Article 321 of the Swiss Code quoted above (Exhibit D).

If other relations between a company (Swiss or foreign) and auditors or accountants are concerned, the parties are free to establish contractual obligations to keep secrecy, but violation of such secrecy does not fall under Article 321 of the Swiss Penal Code (Swiss Federal Supreme Court Decision 83 IV 197).

A violation of such contractual obligation to maintain secrecy could, however, fall under the Articles 162 and 273 of the Swiss Penal Code quoted above (Exhibit B and C).

The client-auditor privilege is for the protection and benefit of the client. The client is free to waive his privilege (Article 321 cipher 2 of the Swiss Penal Code). However, even a waiver by the client could not indemnify the auditor if he discloses business secrets in contravention of Article 162 and/or 273 of the Swiss Penal Code (violation of third party and state interests).

It should be noted in connection with Article 321 cipher 2 that there is no governing authority or supervisory authority over auditors which may authorize them to testify and disclose.

Furthermore, the reserve of cipher 3 of Article 321 of the Swiss Penal Code is subject to any provisions to the contrary of the Federal and Cantonal States.

The competence for personal prosecution in Switzerland is divided among Cantonal and Federal authorities. For violations of Articles 162 and 321 of the Swiss Penal Code, Cantonal procedure law would apply and for violations of Article 273, Federal procedure law. As to the testimonial privilege of accountants or auditors in civil or in criminal proceedings, limitations depend on procedural laws which are Federal and Cantonal (which differ from Canton to Canton). We will restrain ourselves to study the procedure of the Cantons of Geneva and of Zurich where, according to our information, the branch office and the affiliate company of Arthur Andersen & Co. are located.

In civil proceedings, Article 42 of the Federal Law on Civil Procedure of December 4th, 1947 confers upon the persons subject to Article 321 of the Swiss Penal Code, i.e. the statutory auditors of Swiss companies, the right to refuse to give evidence if they are questioned on facts which, according to that provision, come within the field

of professional secrecy, insofar as the interested party has not consented to the disclosure of the secret; the cipher 2 of this Article 42 says that the Judge may relieve the witness (i.e. an accountant even if not acting as a statutory auditor) from the obligation to reveal other professional secrets and business secrets if, despite the precautionary measures of Article 38 ("If protection of business secrets of one party or a third party so demands, the Judge may give evidence in the absence of the adverse party or both parties."), the interests of the witness in guarding the secret is greater to him than the interest of any third party that it should be revealed.

According to Article 227 of the law of Civil Procedure of the Canton of Geneva dated October 13th 1920, persons having knowledge of secrets as a result of their status or profession are not obliged to give evidence. However these persons are bound to give evidence on facts evidenced by deeds to which they were party or to which they have participated as public notaries or instrumental witnesses, in the event that the truth of these facts is contested. Therefore auditors and accountants are not obliged to testify unless they were party to facts which were evidenced by deeds and which are contested.

In the Canton of Zurich, the right to refuse to give evidence is granted to clergymen, physicians, attorneys and notaries without any limitation and to members of other professions (i.e. auditors and accountants) only if the duty to maintain secrecy overrides the duty of disclosure and in this case it is for the court to resolve the conflict between the two duties (Article 188 of the Civil Procedural Law in the Canton of Zurich—Kurt

Mueller: The Swiss Banking Secret from a Legal View, Vol. 18 of the International and Comparative Law Quarterly, p. 367).

In penal proceedings the various penal procedure codes provide for different solutions. Some do not grant any testimonial privilege to accountants or auditors (e.g. Federal Penal Procedure Code, Article 74 seq.; Penal Procedure Code of the Canton of Zurich, Article 128 seq.) while others recognize a testimonial privilege of the statutory auditors of Swiss companies based on the auditorclient privilege stated by Article 730 of the Swiss Code of Obligations (e.g. Penal Procedure Code of the Canton of Geneva, Article 292). As far as we know, there is no testimonial privilege in a penal proceeding for accountants not acting as statutory auditor of Swiss companies in any of the Cantons.

While the reserve of cipher 3 of Article 321 of the Swiss Penal Code also applies to testimony before Swiss courts in case of proceedings under letters rogatory, it may in no way be extended to foreign authorities.

The consequences of an auditor disclosing information without obtaining the client's consent are criminal penalties, imprisonment or fine (inter alia under Article 321 of the Swiss Penal Code), and civil liability.

## 2. Breach of manufacturing or business secrecy:

Article 162 of the Swiss Penal Code

Pursuant to Article 162 section 1 of the Penal Code, any person who discloses a manufacturing or business secret which he was required to keep secret by virtue of a legal or contractual obligation, commits a criminal offence.

The information disclosed must be a manufacturing or business secret. This means that the facts disclosed must relate to manufacturing or commercial transactions which are neither public knowledge nor accessible to the public, which the owner of the secret has a legitimate interest in keeping secret and which he genuinely wishes to keep secret (Federal Supreme Court Decisions 64 II 170, 84 IV 27; Vital Schwander, Das schweizerische Strafgesetzbuch, 2nd ed. 1963, p. 399). In order to constitute a business secret the facts should only be known to a closed circle of persons who are under a duty to keep those facts secret or who have a strong interest themselves in keeping the facts secret (Schwander, op. cit. p. 396; Federal Supreme Court Decision 64 II 171).

The offender must be under a contractual or legal duty to keep secrecy. A *legal duty* exists e.g. for government officials, lawyers, medical doctors, statutory auditors to Swiss corporations but not for auditors under mere contractual obligations.

The existence of a contractual obligation has to be established in each individual case. Usually officers and employees of a business enterprise are under such contractual duty. The same will be true for auditors regardless of whether they perform statutory or just contractual auditing. If an enterprise has its business audited, it can, in the absence of an express agreement on this subject, be said that it impliedly agreed to such disclosures as are required for proper auditing purposes according to generally accepted auditing standards.

According to Article 7 of the Penal Code (Exhibit H), a crime is deemed to have been committed in the place where the act has been done as well as

in the place where such act causes an effect. This means that a violation of Article 162 can be committed abroad if the secret disclosed belongs to a resident of Switzerland.

It should be noted that prosecution for violation of Article 162 may only be undertaken upon complaint of the party whose information has been disclosed, provided such party has not previously consented to the disclosure. This complaint may only be filed within three months after the party concerned has become aware of the identity of the person having violated his rights (Article 29 of the Penal Code). Prosecution and court procedure are barred if the holder of the secret withdraws his complaint before the court has reached its final decision.

Article 273 section 2 and Article 162 section 1 of the Penal Code overlap and it is generally considered that Article 273 overrides Article 162 (Schwander, op. cit. p. 481; Paul Logoz, Commentaire du Code Pénal Suisse I 205). This means that a person may be indicted under both articles for the same disclosure but that he can only be convicted under Article 273 if all requirements of this provision are met.

## 3. Disclosure of economic information

Article 273 of the Penal Code

Article 162 of the Swiss Penal Code is aimed at protecting private interests. Article 273 of the same Code aims to protect the public Swiss interests in keeping confidential files.

Pursuant to Article 273 section 2 of the Penal Code, it is a criminal offence to make available a manufacturing or business secret to an official

or private foreign organization, to a private foreign enterprise or to their agents.

The purpose of this provision is to protect the national sovereignty of Switzerland and more specifically the Swiss economy.

Disclosure of economic information which is considered as jeopardizing Swiss economic interests as a whole is followed by criminal prosecution "ex officio" i.e. without any private complaint being necessary. Disclosure of economic information in these cases is treated as a crime against the State and its sovereignty (Swiss Federal Court Decisions: 71 IV 218, 74 IV 104, 74 IV 211, 85 IV 139, 95 I 449, 98 IV 209 inter alia).

Swiss economic interest requires that enterprises or individuals forming part of the Swiss economy may keep their manufacturing and business secrets. The term "business secret" as used in Article 273 section 2 covers all facts of economic life for which a legitimate interest exists that they be kept secret or in the court's original German language "alle Tatsachen des Wirtschaftslebens, an deren Geheimhaltung ein schutzwürdiges Interesse besteht" (Swiss Federal Supreme Court Decision 74 IV 103, 74 IV 211, 98 IV 210 inter alia).

A review of cases as well as textwriter comments published in Switzerland show conclusively that case law has expressly developed the concept that the crime under Article 273 of the Penal Code does not require that in any particular instance, the interests of the State as such have been endangered or jeopardized (Swiss Supreme Court Decision 74 IV 206 seq.): An offence under Article 273 is committed not only when the person endeavours to discover economic information of a secret nature

in order to make it available to interested parties abroad, whether public or private, but also when a person discloses secrets which come to his knowledge even lawfully, by making such secrets available to interested parties abroad, whether public or private.

The persons who are considered as having a legitimate interest are defined very broadly in the Supreme Court's interpretation of Article 273 of the Penal Code. In fact, the Supreme Court has pointed out that not only the persons directly concerned with the secret but also third parties, such as clients of a bank, clients of a lawyer, employees or trade partners have a legitimate interest in certain facts not being disclosed (Swiss Federal Supreme Court Decision 65 I 330 seq.).

The interests of foreign residents may also be legitimate and therefore be protected by Article 273 of the Penal Code. In an unpublished decision of 1949 the Swiss Federal Supreme Court ruled that a person with foreign nationality and residence having a bank account in Switzerland was protected by Article 273.

In order to be considered a business secret, a fact of economic life must not be generally known but knowledge of it must remain restricted to a certain closed number of persons. In analogy to the interpretation given to Article 162 of the Swiss Penal Code, it must be assumed that a secret which has been disclosed to particular third parties or which by any other means is known to such particular third parties, is not yet considered as generally known. This is particularly true in cases where the third party is under an obligation to keep secrecy (V. Schwander, op. cit. p. 396; Federal Supreme Court Decision 64 II 171).

It is generally recognized that anybody may disclose facts to foreign addressees that only concern himself and in the secrecy of which he is the only party interested. Information concerning more than one party may be disclosed upon agreement of all parties interested unless such disclosure is contrary to the public interest of the Swiss State and its economy.

In order to fall within Article 273 disclosure must be to a foreign official or private organization, to a foreign private enterprise or their agents. The disclosure to a private foreign enterprise was not included in the original version of this article enacted in 1935 as part of a Federal Act to guarantee the security of Switzerland but was only inserted when this provision later became part of the Swiss Penal Code which was adopted in 1937. It is generally considered to be a very far reaching extension of the scope of Article 273. Its interpretation was at issue in a 1948 Federal Supreme Court case:

A former employee of a Swiss private enterprise had disclosed a manufacturing secret of this enterprise to a Belgian enterprise. The Cantonal Supreme Court of the Canton of Neuchâtel had decided that this disclosure would only fall under Article 162 (see below) and not under Article 273 because violation of Article 273 would not only require disclosure to a foreign beneficiary but also that the nature of the secret be such that its disclosure would endanger the Swiss State or its national defense. The Supreme Court reversed this decision on the grounds that the text of the Code was clear and that there was no room for a restrictive interpretation of Article 273. Every dis-

closure of a manufacturing or business secret to a foreign private enterprise would fall under Article 273 section 2 of the Penal Code (Federal Supreme Court Decision 74 IV 206 seq.).

A leading textwriter takes a contrary view and advocates a restrictive interpretation of the clause concerning the disclosure of information to a private foreign enterprise. He thinks that this specific clause can only be justified if there is a danger that the foreign enterprise may make available the information which it has obtained to foreign state officials and that thereafter the foreign state may undertake action against Switzerland or private enterprises or individuals in Switzerland (Schwander, op.cit. p. 481).

The question as to how to apply the provisions of Article 273 of the Penal Code concerning the disclosure of information to foreign private enterprises is indeed rather complex, particularly with regard to the flow of information between a private foreign enterprise and its Swiss branch or its wholly owned Swiss subsidiary. It cannot be denied that certain information has to be exchanged across the Swiss border and this information often is kept secret within the international corporation or group and thus constitutes a business secret. However, generally no problem arises as the Swiss parties interested in the secret in such situations agree to the intra-corporation or intra-group disclosure of information and consequently Article 273 does not apply, provided neither third party interests nor the direct interest of the Swiss State is endangered (compare above).

Where third party interests are involved, the plain wording of Article 273 would include the intra-

company or intra-group disclosure of information and information may therefore not be disclosed to addressees abroad.

In order to constitute a violation of Article 273 section 2 of the Penal Code the person who discloses information must know that the information is a manufacturing or business secret and that he is disclosing the information to a foreign addressee as specified in Article 273 of the Penal Code.

Out of the three Articles of the Swiss Penal Code above, Article 273 concerning disclosure of economic information to foreign addressees and Article 321 concerning breach of professional secrecy are more important and more specific than Article 162 which is aimed only at protecting private interests. Conviction for violation of the latter Article is therefore likely to occur in situations where the other two Articles do not apply.

## 4. Breach of banking secrecy

Article 47 of the Swiss Federal Banking Law

Pursuant to Article 47 of the Federal Banking Law of 1934 (Exhibit I) anyone who, in his capacity as auditor, or as director, officer or employee of the auditing firm of a bank, intentionally or negligently, violates his professional rule of secrecy, is guilty of a criminal offence. The fact whether or not the auditor serves as statutory auditor of a Swiss bank does not change anything with regard to the application of banking secrecy. The Federal Banking Law does not state in which cases there is a right or duty to give information. The professional duty to maintain banking secrecy is imposed by private law as opposed to penal law and arises out of the contractual relationship between the

bank and its customer. However Article 47 of Federal Banking Law creates a penal sanction in case of breach of this private law duty. Banking secrecy covers all items of a business or personal nature of which the bank acquires knowledge in connection with the business transactions of and consultations with its customers (Kurt Mueller, op. cit. p. 362). Directors, officers and employees of the auditing firm working for a Swiss bank have a professional duty to keep secret all facts and things, not matters of public knowledge, kerned by them in the bank during the course of their duties.

It must be remembered that the Banking Law applies also to subsidiaries or branch offices of foreign banks established in Switzerland (Article 2 of the Federal Banking Law). Thus these banks are subject to the secrecy rule to the same extent as Swiss banks (Kurt Mueller, op.cit. p. 363 in fine).

Violation of banking secrecy under Article 47 of the Federal Banking Law by a director, officer or employee of an auditing firm is not the sole ground on which criminal liability may be incurred. The director, officer or employee of an auditing firm could also be indicted under Article 273 of the Penal Code for such disclosure if he reveals a manufacturing or business secret to an official or private foreign organization or to a private foreign enterprise or to their agents. The disclosure of a manufacturing or business secret, if it does not fall within the prohibition of Article 47 of the Swiss Federal Banking Law and/or Article 273 of the Swiss Penal Code, might still be punishable under Article 162 of the Swiss Penal Code if such disclosure is in breach of the contractual obligation between the auditing firm and the Swiss bank.

The Penal Code applies only to natural persons; corporate bodies or partnerships cannot be convicted of the felonies and misdemeanors stated in the Penal Code (Federal Supreme Court Decision 85 IV 89); only their directors, officers and employees can be so convicted.

According to Article 3 of the Swiss Penal Code any persons who commits a criminal offence in Switzerland is subject to the Swiss Penal Code.

By virtue of Articles 4 (Exhibit F), 5 (Exhibit G) and 7 (Exhibit H) of the Swiss Penal Code, Article 730 of the Swiss Code of Obligations, Article 47 of the Federal Banking Law, as well as Articles 162, 273 and 321 of the Swiss Penal Code have extraterritorial effect. A disclosure abroad by the director, officer or employee of a Swiss auditing or accounting firm is deemed to cause an effect in Switzerland by virtue of the fact that the information involves the activities of a Swiss company and therefore the person who discloses the business secret abroad may incur criminal liability in Switzerland under the above mentioned Articles.

## IV. QUESTIONS AND ANSWERS

On the basis of the factual situation outlined in the beginning and under the relevant laws, decisions of the Swiss Federal Supreme Court, textwriter comments and legal considerations as stated above, the undersigned answers as follows to the following questions:

## Question 1:

Is information obtained by accountants in the course of accounting and auditing work in Switzerland for a client prohibited by law from being disclosed to others?

## Answer 1:

Regarding information obtained by accountants in the course of accounting and auditing work performed in Switzerland, Article 162 of the Swiss Penal Code would apply to any disclosure made in the absence of the client as well as, due to the particular situation of auditors, to any disclosure which might be of interest to third parties, i.e. namely clients and trade partners of the auditor's client.

Furthermore the providing of information under an order of a US court would make available business secrets to a foreign authority and, as such fall under section 2 of Article 273 of the Swiss Penal Code quoted above.

Besides, the disclosure of information obtained in the course of auditing Swiss companies as statutory auditors would constitute a breach of professional secrecy imposed upon auditors by Article 321 of the Penal Code in connection with Article 730 of the Code of Obligations. Finally, information obtained by auditors in the course of auditing work regarding a bank established in Switzerland has to be kept secret according to Article 47 of the Federal Banking Law.

The disclosure of information obtained in the course of accounting and auditing work in Switzer-land is therefore prohibited by law in each particular case.

## Question 2:

What criteria are applied to determine whether particular information is subject to the nondisclosure law?

## Answer 2:

As stated under III. above, business secrets have been given a very broad construction by the Swiss Federal Supreme Court and cover all facts of economic life which are not generally known and for which a legitimate interest exists that they be kept secret. Not only the interests of the parties directly concerned but also the interests of third parties, e.g. clients, employees or trade-partners, as well as the public interest of Switzerland itself and its economy are considered as legitimate.

## Question 3:

Is there any difference in the application of the nondisclosure law in the case of documents or data obtained by the accountant in his confidential relationship as accountant, depending of the nature of source of the documents or data:

- a) documents obtained from the client?
- b) documents obtained from persons other than the client?
- c) documents to which persons other than the client or the accountants are parties?
- d) documents prepared by the accountants relating to the client or the conduct of the auditing or accounting work for the client?
- e) non-documentary information concerning the affairs of the client of others?
- f) documents or information obtained from or prepared outside of Switzerland but in the possession of the accountants in Switzerland?

## Answer 3:

Article 273 section 2 of the Penal Code prohibiting the disclosure of business secrets does not distinguish how the documents are obtained, nor whether documentary or non-documentary information is concerned. The Swiss Federal Supreme Court has also ruled that it does not matter whether the information disclosed is true or false (Swiss Federal Supreme Court Decision 74 IV 103) nor whether this information was obtained legally or illegally by the person charged with violation of Article 273 section 2 of the Penal Code (Swiss Federal Supreme Court Decision 85 IV 139).

The same rules would apply regarding Article 321 of the Penal Code concerning the professional secrecy.

The situation is somewhat different with regard to Article 162 of the Penal Code which only prohibits the disclosure of business secrets if a legal or contractual obligation to observe secrecy exists. Regarding accountants, a legal obligation to observe secrecy exists only for the statutory auditing of Swiss companies (Article 730 of the Code of Obligations) while the existence of a contractual obligation has to be checked in each individual case. By virtue of the subordination of Article 162 to Article 273 and 321 of the Penal Code it seems not necessary to go into further details regarding Article 162.

Based on Article 273 of the Penal Code, the answers to your question would therefore be:

- a) No
- b) No
- c) No
- d) No
- No, it does not matter if the information is documentary or not;
- f) It would not make any difference whether the information was obtained from abroad

or whether it was prepared outside Switzerland as long as the information was available in Switzerland.

## Question 4:

What are the consequences of the disclosure of documents or information in violation of the law?

- a) criminal penalties?
- b) civil penalties?
- c) forfeiture of licence to practice accounting?

## Answer 4:

- a) the possible criminal penalties are as follows:
  - —violation of Article 273 section 2 of the Swiss Penal Code for which imprisonment or solitary confinement with a possible additional fine may be imposed;
  - —violation of Article 162 of the Swiss Penal Code for which imprisonment or fine may be imposed;
  - —violation of Article 321 of the Swiss Penal Code for which imprisonment or fine may be imposed;
  - —violation of Article 47 of the Swiss Federal Banking Law for which imprisonment (but not exceeding 6 months) or fine (which may go up to Sw.Fr. 50'000.—) or both may be imposed.

## Under the Swiss Penal Law:

- —Imprisonment is of not less than 3 days nor more than 3 years (Article 36 of the Penal Code).
- -Solitary confinement is not less than one year nor more than 20 years; if expressly

- provided by law, may be a maximum of life (Article 35 of the Penal Code).
- —Fines may go up to Sw. Fr. 40'000.—(Article 48 of the Penal Code).
- b) Civil liabilities will be incurred towards all persons damaged by an illegal disclosure of information pursuant to the provisions relating to texts.
- c) We understand that Arthur Andersen & Co. S.A. has been granted by the Swiss Bank Commission the licence for bank and mutual fund auditing as from August 16th, 1972 and by the Swiss Federal Council the licence to perform the special auditing required whenever a Swiss company plans to reduce its sharecapital as from February 24th, 1976. Criminal conviction for breach of professional secrecy or violation of Article 162 or 273 of the Swiss Penal Code or Article 47 of the Swiss Federal Banking Law might endanger the licence of Arthur Andersen & Co. S.A. to act as bank and mutual fund auditor or as special auditor in case of capital reduction. The final decision would be with the competent authorities and probably depend on the extent of the illegal disclosures. As no licence is needed to perform statutory auditing for ordinary corporations or to perform contractual auditing, Arthur Andersen & Co. could still continue to perform such services in Switzerland.

## Question 5:

Under what circumstances may documents or other information be disclosed?

a) is the consent of the client required?

- b) is the consent of those involved in the transaction reflected in such documents or data, in addition to the consent of the client required?
- c) is consent of anyone else other than the client required?
- d) would disclosure be permissible if made pursuant to a request of a party in connection with civil litigation pending in a United States district court?
- e) would disclosure be permissible if made pursuant to an order of a United States court directing responses to written question, or production of documents, a violation of which would be punishable by penalties for contempt of court (fine or imprisonment)?

## Answer 5:

a), b) and c): Under Articles 321 and 162 of the Penal Code and under Article 47 of the Federal Banking Law, documents or other information may be disclosed if the client as the holder of the secret agrees to such disclosure and if no third party interests (e.g. of clients and business partners of the auditor's client) are prejudiced because either the information does not concern third parties or the third parties concerned agree to the disclosure. If the client or the third parties do not agree in advance, they may still waive their right to file a complaint, as, according to Article 29 of the Swiss Penal Code, if within three months no complaint is filed by a party concerned, the Public Prosecutor has no right to prosecute anybody for breach of a manufacturing or business secret pursuant to Articles 162 or 321, what is not the case under Article 47 of the Federal Banking Law since the prosecution may be started "ex officio"

by the Public Prosecutor, i.e. without any private complaint being necessary.

Under Article 273 section 2 of the Penal Code which concerns a crime against the State interests, the consent of the client and of third parties which have any legitimate interest would not be a satisfactory protection for the auditor or accountant since it may be that the public interest of Switzerland and its economy may be violated by such disclosure where no private party is opposed to disclosure. Under this Article 273, the Public Prosecutor has to start prosecution ex officio if any legitimate interests of third parties or the public interest of Switzerland and its economy appear endangered.

d) and e): The fact that information is disclosed pursuant to a request of a party in connection with civil litigation pending in a US district court or pursuant to an order of an US court does not make the disclosure legal and would not prevent the companies of Arthur Andersen & Co. in Switzerland, from being liable vis-à-vis its clients, and vis-à-vis third parties connected with its clients, and vis-à-vis the Swiss State for such disclosure as would fall under the perview of the above mentioned provisions.

The only rightful way for US courts to obtain information from Swiss sources would be by means of letters rogatory issued by a civil court or by a criminal court addressed to the Swiss Federal Government through diplomatic channels. The Swiss Federal authorities have sole discretion as to whether or not to communicate such letters rogatory to the competent Cantonal judicial authorities which may order the auditors or their assis-

tants to testify in answer to the questions, provided that the code of civil or criminal procedure in the Canton from which the evidence is required does not prohibit such testimony by accountants or auditors.

## Question 6:

Would it be a violation of the laws of Switzerland for Arthur Andersen & Co. to take such documents and data outside of Switzerland and to the United States for the purpose of complying with an order of a United States court?

#### Answer 6:

Directors, officers and employees of a Swiss auditing firm have a professional or contractual duty to keep secret all facts and documents, not matters of public knowledge, learned by them in the course of their duties. This duty continues to exist after the business relationship between the auditor or accountant and its client has terminated. The production and disclosure of business secrets by directors, officers and employees of your auditing firms in Switzerland to foreign authorities would constitute a breach of professional secrecy (Article 321 of the Swiss Penal Code) and a violation of the Articles 162 and 273 of the Swiss Penal Code as well as in particular cases, a breach of bank secrecy (Article 47 of the Federal Banking Law); these directors, officers and employees will be liable vis-à-vis the clients and third parties whose relationship with the clients and business secrets would be disclosed, unless client and third parties have waived their rights; if disclosure of information is contrary to the interests of the Swiss State and its economy,

which cannot be excluded, they may be held liable where no private party is opposed to disclosure.

The removal outside Switzerland of secret documents by a director, officer or employee of your auditing firms in Switzerland does not in and of itself constitute a violation of above mentioned provisions, provided such person takes all precautions to keep such documents confidential at all times. It is only their disclosure which is prohibited unless prohibition has been waived and information disclosed is not contrary to the interests of the Swiss State.

> /s/ Pierre Oederlin Pierre Oederlin

## Exhibit A - Swiss Code of Obligations (Commercial Law)

## Article 730

3. Discrétion à

Art. 730 (-723) Il est interdit aux contrôleurs de communiquer à des actionnaires individuellement ou à des tiers les constatations qu'ils ont faites dans l'exécution de leur mandat.

## Exhibit B – Swiss Penal Code, Article 162

Violation du secret de secret commercial

Art. 162 Celui qui aura révélé un secret fabrication ou du de fabrication ou un secret commercial qu'il était tenu de garder en vertu d'une obligation légale ou contractuelle,

> celui qui aura mis à profit cette révélation,

> sera, sur plainte, puni de l'emprisonnement ou de l'amende.

## Exhibit C - Swiss Penal Code, Article 273

Service de renseignements économiques

Art. 273 Celui qui aura cherché à découvrir un secret de fabrication ou d'affaires pour le rendre accessible à un organisme officiel ou privé étranger, ou à une entreprise privée étrangère, ou à leurs agents,

celui qui aura rendu accessible un secret de fabrication ou d'affaires à un organisme officiel ou privé étranger, ou à une entreprise privée étrangère, ou à leurs agents,

sera puni de l'emprisonnement ou, dans les cas graves, de la réclusion. Le juge pourra en outre prononcer l'amende.

## Exhibit D - Swiss Penal Code, Article 321

Violation du secret professionnel Art. 321 1. Les ecclésiastiques, avocats, défenseurs en justice, notaires, contrôleurs astreints au secret professionnel en vertu du code des obligations, médecins, dentistes, pharmaciens, sages-femmes, ainsi que leurs auxiliaires, qui auront révélé un secret à eux confié en vertu de leur profession ou dont ils avaient eu connaissance dans l'exercise de celle-ci, seront, sur plainte, punis de l'emprisonnement ou de l'amende.

Seront punis de la même peine les étudiants qui auront révélé un secret dont ils avaient eu connaissance à l'occasion de leurs études.

La révélation demeure punissable alors même que le détenteur du secret n'exerce plus sa profession ou qu'il a achevé ses études.

- 2. La révélation ne sera pas punissable si elle a été faite avec le consentement de l'intéressé ou si, sur la proposition du détenteur du secret, l'autorité supérieure ou l'autorité de surveillance l'a autorisée par écrit.
- 3. Demeurent réservées les dispositions de la législation fédérale et cantonale statuant une obligation de renseigner une autorité ou de témoigner en justice.

## Exhibit E - Swiss Penal Code, Article 3

3. Conditions de lieu Crimes ou délits commis en Suisse

Art. 3 1. Le présent code est applicable à quiconque aura commis un crime ou un délit en Suisse.

Si, à raison de cette infraction, l'auteur a subi totalement ou partiellement une peine à l'étranger, le juge suisse imputera la peine subie sur la peine à prononcer.

2. L'étranger poursuivi à l'étranger à la requête de l'autorité suisse ne pourra plus être puni en Suisse pour le même acte:

si le tribunal étranger l'a acquitté par un jugement passé en force;

s'il a subi la peine prononcée contre lui à l'étranger, si cette peine lui a été remise ou si elle est prescrite. S'il n'a pas subi cette peine, elle sera exécutée en Suisse; s'il n'en a subi qu'une partie à l'étranger, le reste sera exécuté en Suisse.

## Exhibit F - Swiss Penal Code, Article 4

Crimes ou délits commis à l'étranger contre l'État Art. 4 'Le présent code est applicable à quiconque, à l'étranger, aura commis un crime ou un délit contre l'Etat (art. 265, 266, 266bis, 267, 268, 270, 271, 275, 275bis, 275ter), se sera rendu coúpable d'espionnage (art. 272 à274) ou aura porté atteinte à la sécurité militaire (art. 276 et 277).

<sup>2</sup>Si, à raison de cette infraction, l'auteur a subi, totalement ou partiellement, une peine à l'étranger, le juge suisse imputera la peine subie sur la peine à prononcer.

## Exhibit G - Swiss Penal Code, Article 5

Crimes ou délits commis à l'étranger contre un Suisse Art. 5 'Le présent code est applicable à quiconque aura commis à l'étranger un crime ou un délit contre un Suisse, pourvu que l'acte soit réprimé aussi dans l'Etat où il a été commis, si l'auteur se trouve en Suisse et n'est pas extradé à l'étranger, ou s'il est extradé à la Confédération à raison de cette in-

fraction. La loi étrangère sera toutefois applicable si elle est plus favorable à l'inculpé.

<sup>2</sup>L'auteur ne pourra plus être puni à raison de son acte s'il a subi la peine prononcée contre lui à l'étranger, si cette peine lui a été remise ou si elle est prescrite.

<sup>3</sup>S'il n'a pas subi à l'étranger la peine prononcée contre lui, elle sera exécutée en Suisse; s'il n'a subi à l'étranger qu'une partie de cette peine, le reste sera exécuté en Suisse.

## Exhibit H - Swiss Penal Code, Article 7

Lieu de commission du crime ou délit Art. 7 'Un crime ou un délit est réputé commis tant au lieu où l'auteur a agi, qu'au lieu où le résultat s'est produit.

<sup>2</sup>Une tentative est réputée commise tant au lieu où son auteur l'a faite, qu'au lieu où, d'après le dessein de l'auteur, le résultat devait se produire.

## Exhibit I - Swiss Federal Banking Law

Art 47 1. Celui qui, en sa qualité de membre d'un organe, d'employé, de mandataire liquidateur ou de commissaire de la banque, d'observateur de la Commission des banques, ou encore de membre d'un organe ou d'employé d'une institution de revision agréée, aura révélé un secret à lui confié ou dont il avait eu connaissance à raison de sa charge ou de son emploi.

celui qui aura incité autrui à violer le secret professionnel,

sera puni de l'emprisonnement pour six mois au plus ou de l'amende jusqu'à concurrence de 50,000 francs.

- Si le délinquant a agi par négligence,
   la peine sera l'amende jusqu'à concurrence de 30,000 francs.
- 3. La violation du secret demeure punissable alors même que la charge ou l'emploi a pris fin ou que le détenteur du secret n'exerce plus sa profession.
- 4. Sont réservée les dispositions de la législation fédérale et cantonale statuant l'obligation de renseigner l'autorité et de témoigner en justice.

Vu pour légalisation de la signature apposée au recto de la présente par Monsieur Pierre OEDERLIN.

Genève, le vingt-neuf mars mil neuf cent soixante-seize.

[Signature]

Vu pour la légalisation de la signature de M. Philibert LACROIX, not. apposée ci-dessus. Genève, le 30 MARS 1976

pr la Chancellerie d'Etat:

[Signature]

Maurice FIUMELLI commis

CONFEDERATION OF SWITZERLAND
CANTON AND CITY OF BERN
EMBASSY OF THE UNITED STATES
OF AMERICA

I, JUSTICE B. STEVENS, Consul of the United States of America at Bern, Switzerland duly commissioned and qualified, do hereby certify that MAURICE FIUMELLI whose true signature and official seal are, respectively, subscribed and affixed to the foregoing document was, on the 30th day of March, 1976, the date thereof, an Acting State Chancellor of Geneva to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand affixed the seal of the Embassy of the United States of America at Bern, Switzerland, this 30th day of March, 1976.

[Signature]

Justice B. Stevens
Consul
of the United States of America

## APPENDIX F

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DATED JUNE 25, 1976 (PORTIONS PERTAINING TO UNRELATED DISCOVERY DISPUTE DELETED)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO M.D.L. DOCKET NO. MDL 79-1

Civil Action No. C-4628

IN RE:

KING RESOURCES
COMPANY
SECURITIES
LITIGATION
STATE OF OHIO,
Plaintiff.

ORDERS RE PENDING DISCOVERY MOTIONS

VS.

CROFTERS, INC., et al., Defendants.

THIS MATTER comes before the Court on two pending motions filed in the above-captioned litigation by defendant Arthur Andersen & Co.

1

We have considered the Motion of Defendant Arthur Andersen & Co. for an Order Withdrawing Order Concerning Deocuments [sic] and Information Located in Geneva, Switzerland and for Entry of a New Order Concerning Such Documents and Information, filed June 17, 1976; as well as Plaintiff's Memorandum in Opposition to Motion of Defendant Arthur Andersen and Co. To Withdraw Discovery Order Concerning IOS, filed June 22, 1976.

This Court is not of a view to establish or supervise a detailed blueprint for the discovery procedures in this regard. Our manifest concern is that discovery in this case has already been inordinately delayed. We are satisfied that professional concern and cooperation will prevail with the result that counsel's efforts will assist the orderly progression of this litigation. To this end, counsel for Arthur Andersen & Co. are directed to meet with counsel for Plaintiff State of Ohio at the earliest possible moment; and in any event not later than 5:00 p.m., Wednesday, June 30, 1976. The Court will then entertain a joint written motion outlining an agreed-upon modified procedure for resolution of this dispute. A report from counsel reflecting inability to reach an agreement or the joint motion referred to above, together with a proposed stipulated order, is to be filed with this Court by 12:00 noon, Thursday, July 1, 1976.

II

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We expressly discourage last minute motions or letters which detract from this and other pending litigation. Consideration for the Court's time should be given before counsel file motions that prompt immediate judicial management. Henceforth, all matters relating to this litigation shall be in motion, not letter, form.

DATED at Denver, Colorado, this 25 day of June, 1976.

## BY THE COURT:

/s/ Sherman G. Finesilver SHERMAN G. FINESILVER, Judge United States District Court

## APPENDIX G

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DATED JULY 2, 1976 (PORTIONS PERTAINING TO UNRELATED DISCOVERY DISPUTE DELETED)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO M.D.L. DOCKET NO. MDL 79-1

Civil Action No. C-4628

IN RE:

KING RESOURCES COMPANY SECURITIES LITIGATION STATE OF OHIO,

Plaintiff,

ORDER 1976-9 ORDER RE PENDING DISCOVERY DISPUTES

VS.

CROFTERS, INC., et al., Defendants.

THIS MATTER comes before the Court for additional orders on pending discovery matters. The Court, having considered the briefs and statements of counsel and the proposed orders tendered therewith, enters the following orders:

ORDERED — This Court's Order, dated May 27, 1976, which stated: "3) Motion for discovery of certain documents of Andersen & Co. is granted . . ." is hereby withdrawn, and with respect to the discovery sought by plaintiff, Andersen shall proceed in the following manner:

## A. Discovery Sought:

- Produce for Inspection and Copying by the Plaintiff State of Ohio the Following:
  - (a) Reports of examinations, draft reports, working papers, correspondence and news clipping files in the Geneva office of Arthur Andersen & Co., if any, which reflect the decreasing cash flow and liquidity of IOS, Ltd., Fund of Funds, Ltd. (including its subsidiary F.O.F. Proprietary Funds, Ltd.) during the period from September 1, 1969 through May 31, 1970.
- Answer The Following Interrogatories Propounded By The Plaintiff State Of Ohio And Produce For Inspection And Copying By Ohio The Documents Identified In The Answers To The Questions:
  - (a) Did the Geneva office of Arthur Andersen & Co. at any time learn of agreements, negotiations, or any proposed agreements, negotiations, or any proposed agreements or negotiations to the effect that John M. King, KRC, or the Colorado Corporation, alone or in combination, through loans, stock purchases, or in any other manner, proposed to obtain control, ownership, or partial ownership or control of IOS, Ltd.?
  - (b) If the answer to (a) above is other than an unqualified negative:
    - (1) On what date did the Geneva office of Arthur Andersen & Co. first learn of such a proposal?

- (2) Please identify the person or persons from whom the Geneva office of Arthur Andersen & Co. first learned of such a proposal.
- (3) Please identify the partners, employees, or other persons associated with the Geneva office of Arthur Andersen & Co. who were the first to learn of such a proposal.
- (4) Please identify (and produce for inspection and copying) any and all documents from the Geneva office of Arthur Andersen & Co. reflecting when that office first had knowledge of such a proposal.
- (5) What was the nature of any such proposal at the time the Geneva office of Arthur Andersen & Co. first became aware of it?
- (6) Did the nature of such proposal change over time?
- (7) If the answer to the preceding question is other than an unqualified negative, how did the nature of the proposal change?
- (c) If the answer to (a) above is other than an unqualified negative, what audit procedures or other investigatory steps did you use with respect to or in contemplation of such proposal?
- (d) With regard to the answer to (c) above:
  - Please identify (and produce for inspection and copying) all documents from the Geneva office of

Arthur Andersen & Co., including, without limitation, books, manuals, or memoranda which treat generally the subject of audit responsibilities, necessary or advisable procedures, investigatory steps to be taken, or subjects likely to be of concern in conducting audits of enterprises which are contemplating or have entered negotiations with respect to such proposals.

- (2) Please identify (and produce for inspection and copying) every document from the Geneva office of Arthur Andersen & Co. relating to audit procedures or other investigatory steps taken by that office with respect to such proposal.
- (3) Please identify each partner or employee of the Geneva office of Arthur Andersen & Co. who participated in audit procedures or other investigatory steps with respect to er related to such proposal.
- (4) Please identify all individuals at KRC, Investors Overseas Services, or affiliated entities who were contacted by the Geneva office of Arthur Andersen & Co. in the course of employing audit procedures or other investigatory steps with respect to such proposal.
- B. Procedure to Be Followed by Arthur Andersen & Co.
  - 1. Cause to be concluded the search presently

being conducted of the files of Arthur Andersen & Co. located at Geneva, Switzerland that may contain documents responsive to the above request for production of documents and answers to the above interrogatories, and segregate such documents.

- 2. On or before July 12, 1976, produce to plaintiff for inspection and copying at any of Andersen's offices in the United States, the documents and information requested. *However*, with respect to any documents or information the release of which defendant believes would subject it to civil or criminal liability under Swiss law, defendant shall, by July 12, 1976:
  - (i) Exert every effort to obtain the release of such documents or information, through obtaining consents or waivers which may be necessary to comply with this Order and with Swiss law;
  - (ii) Identify any document (by type of document, subject and title of document, author, addressee, date) or information (by subject matter and source) which has not been produced; state with specificity the grounds including what efforts have been made to effect production, and what efforts are planned to be made.
  - (iii) Deliver to the Court all documents identified in (ii) above, organized and catalogued in such form that if this Court determines that some or all of such documents must be produced, based on this Court's evaluation both of the reasons given by Andersen for non-production and of efforts exerted by Andersen to effect production, any such documents may be made available without further delay for inspection and copying by plaintiff State of Ohio.
- 3. On or before July 16, 1976, counsel for Ohio and Arthur Andersen are directed to meet in an effort

to resolve differences respecting any documents or data which have not by that date been produced by Arthur Andersen. Only upon conclusion of such meeting may the parties take such further steps as may be appropriate under the federal rules.

IT IS FURTHER ORDERED that there will be no interlocutory appeals from discovery orders in this case and the Court will summarily deny applications for same. Paramount Film Distributing Corp. v. Ritter, 333 F.2d 358 (10th Cir. 1964); see also Denson v. Brown, No. 74-8075 (10th Cir., July 29, 1974 (Appendix No. 13) (Unpublished Opinion).

FURTHER, the Court expressly orders that if, upon in camera inspection of the documents subject to claims of attorney-client or foreign law privilege, it appears that such claims were made frivolously or without good faith, the Court will impose sanctions.

DATED at Denver, Colorado, this 2 day of July, 1976.

#### BY THE COURT:

/s/ Sherman G. Finesilver SHERMAN G. FINESILVER, Judge United States District Court

## APPENDIX H

EXCERPTS FROM THE DOCKET SHEET OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, REFLECTING ORDERS OF JULY 23, 1976.

STATE OF OHIO

VS.

C-4628 Page 19

CROFTERS, INC., ET AL

DATE

**PROCEEDINGS** 

1976

7/23

ORDERED: that the Swiss documents shall be produced to the State of Ohio by Aug. 19, 1976.

ORDERED: as to documents containing deletions and selfediting counsel shall confer; and, if necessary, the entire document is to be submitted to the Court for in camera inspection.

ORDERED: Imposition of sanctions are withheld until further order of Court.

eod 7/23.

## APPENDIX I

## SUPPLEMENTARY OPINION OF SWISS COUNSEL

Lenz, Schluep, Briner & De Coulon Avocats au Barreau de Genève 25, Grand'Rue • 1211 Genève 11

## TO WHOM IT MAY CONCERN

## AFFIDAVIT

You have advised us that the U.S. District Court has ordered that Arthur Andersen & Co. produce for the Court's inspection all documents located at the Geneva office, the release of which Arthur Andersen & Co. believe would subject them to civil or criminal liability under Swiss law. You have asked us whether it would be a violation of Swiss law for Arthur Andersen & Co. to produce such documents to the Court itself.

As said in our legal opinion dated March 29, 1976, the fact that business secrets would be disclosed pursuant to an order of a U.S. Court would not make the disclosure legal and would not prevent the directors, officers or employees of Arthur Andersen & Co. from being liable of a violation of Swiss law. This applies equally even when the production ordered is only to the Court. Disclosure of such business secrets to the Court itself would render the directors, officers or employees of Arthur Andersen & Co. liable to sanctions for violation of Swiss law.

Dated this 9th day of July 1976 at Geneva.

/s/ Jean-Paul Aeschimann Jean-Paul Aeschimann

## APPENDIX J

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DATED JULY 16, 1976

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. C-4628

STATE OF OHIO,

Plaintiff,

ORDER — No. 11.

CROFTERS, INC., et al.

Defendants.

By 5:00 p.m., July 19, 1976, plaintiff's counsel is directed to file brief in support of Plaintiff's, (State of Ohio), Motion For Imposition of Sanctions filed July 15, 1976; Defendant, Arthur Andersen & Co., is to file its brief in opposition to said Motion and brief by 5:00 p.m., Wednesday, July 21, 1976. Said documents are to be hand carried to other counsel and the Court.

The Motion will be considered by this Court on Thursday, July 22, 1976 at 1:30 p.m. — time heretofore set for supplemental pretrial in this action.

All pending Motions will also be considered on said date and time.

DATED at Denver, Colorado, this 16 day of July, 1976.

## BY THE COURT:

/s/ Sherman G. Finesilver SHERMAN G. FINESILVER, Judge United States District Court

## APPENDIX K

EXCERPTS FROM TRANSCRIPT OF HEARING ON JULY 22, 1976 BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLO-RADO

The Court is not going to rule on the question of sanctions to this extent other than that the Court has vast powers of sanctions. National Hockey League vs. Metropolitan Hockey Club underscores the vast, strong power that the Court has even to dismiss a case, but I'm suggesting that in the coolness of the hour tomorrow morning that Counsel ought to meet together, and I'm directing that Mr. Patrick be there with your associates.

I'm satisfied that perhaps in the light of day tomorrow Counsel are going to meet in the offices of Holland & Hart and see to what extent, if any, you might be able to come to some grips with the mutual progression of this case in the spirit of cooperation that should have prevailed in this case from the very first filing.

The Court will take the question of sanctions under advisement. The Court will meet with Counsel tomorrow morning at eleven o'clock. You are to meet in Mr. Hobson's office at 8:15. APPENDIX L

EXCERPTS FROM TRANSCRIPT OF HEARING ON JULY 23, 1976 BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLO-RADO

THE COURT: The Court is going to direct that as expeditiously as possible, even on a day-by-day basis, at such time as the Swiss documents are obtained by Arthur Andersen's Counsel, they shall be given to the State of Ohio, their Denver Counsel, that in no event shall this extend beyond the 20th of August.

Now, I want it clearly understood that the 19th of August is the cutoff date. The cutoff date is tonight for documents that you can get by tonight, but in any event, with or without consents, the Court wants full compliance by the 20th of August on these 20 or 25 documents, even if it necessitates activity through the State Department or it necessitates activity through the Swiss courts.

I am not enamored with the approach to Swiss law taken by Defense Counsel. However, this period of time will no doubt, I'm sure, produce these documents. The Court is withholding the appointment of an expert in Swiss law to come over from Switzerland who is versed in Swiss law and American law to give testimony on this point. I do not want to add to the cost of litigation of five or ten thousand dollars at least and go to a peripheral issue on 25 documents.